No. 96-491

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS PHANEL, CHARLES JONES, TOMMY MARTIN, HOYT JARRARD, and ROBERT STEIN,

Petitioners,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SANTA FE TERMINAL SERVICES, INC., and SF-TERMINAL SERVICES, DIVISION OF MIJACK PRODUCTS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AS *AMICI CURIAE* OF THE EMPLOYERS GROUP, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF RESPONDENTS

[illegible]
[illegible]
National Association of Manufacturers
[illegible] Pennsylvania Avenue, NW
Washington, DC 20004
[illegible]

ROBERT N. SOCLES
(COUNSEL OF RECORD)
KAREN M. WAHL
O'MELVENY & MYERS LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 383-5300

Counsel for *Amici Curiae*

[illegible]
[illegible]
Association of American Railroads
[illegible]
Washington, DC 20036
[illegible]

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INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, TOMMY MARTIN, HOYT JARRARD, and ROBERT STEIN,
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v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SANTA FE TERMINAL SERVICES, INC., and IN-TERMINAL SERVICES, DIVISION OF MI-JACK PRODUCTS, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AS *AMICI CURIAE* OF THE EMPLOYERS GROUP, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

Amici are associations of employers located throughout the United States. Their members sponsor employee

benefit plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA").[1] The Employers Group, headquartered in California, is one of the nation's oldest and largest human resources management associations. Formerly known as the Merchants & Manufacturers Association and the Federated Employers, it represents nearly 5,000 companies employing an aggregate of more than 2.5 million employees.

The National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85 percent of all manufacturing workers and produce over 80 percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council.

The Association of American Railroads ("AAR") is a non-profit, incorporated trade association of the nation's major railroads. AAR's members operate approximately 73 percent of the line haul mileage, employ approximately 89 percent of the workers, and generate approximately 91 percent of the freight revenues of all railroads in the United States.

All of these associations represent their members by, among other ways, *amicus* participation in cases like this one

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[1] This brief is filed with the consent of the parties. Their letters of consent have been filed with the Clerk of the Court with this brief.

that present significant issues of interest to their members. This case arises from the action of respondent The Atchison, Topeka and Santa Fe Railway Company to reduce the costs of its operations in Los Angeles by contracting out to an unrelated company cargo-loading work that had previously been provided by a subsidiary. Employees who had performed this work were terminated from employment, and many of them were hired to work for the new contractor. As a result of this action, affected employees, including petitioners, lost certain non-ERISA benefits and received reduced levels of ERISA-covered benefits. They challenge their termination of employment as unlawful under § 510 of ERISA, 29 U.S.C. § 1140.

This case presents the first opportunity for the Court to construe § 510 in the context of an employer's decision to restructure its business in a way that affects ERISA-covered benefits. *Amici* are concerned that arguments offered by and in support of petitioners in this case could, if accepted by the Court, subject employers to substantial litigation and liability under § 510 of ERISA. Congress enacted § 510 to protect an employee from an adverse employment action, such as a discharge, that was intended to interfere with that employee's attainment of a particular benefit right. *Amici* believe that § 510 can and should be interpreted to fulfill that congressional purpose without also prohibiting employers from taking into account the costs of employee benefits, which typically represent a significant portion of compensation costs, in deciding how best to structure their businesses.

SUMMARY OF ARGUMENT

Section 510 of ERISA, 29 U.S.C. § 1140, prohibits an employer from discharging, or taking other adverse actions against, a participant in an ERISA-covered employee benefit plan for the purpose of interfering with that participant's attainment of rights under the plan or ERISA. Recognizing that any termination of employment interferes with a participant's future ability to obtain plan benefits, courts have held that § 510 is violated only where a plaintiff can show that the termination of employment was undertaken with a "specific intent" to interfere with that plaintiff's attainment of benefit rights.

In the case of an individual participant who has been terminated from employment, it is not sufficient to establish "specific intent" to show that the termination saved the employer the normal costs of that participant's future benefits. Rather, the participant must show that an intent to interfere with his or her attainment of some particular benefit right, typically one that involves high costs to the employer, motivated the termination. The same rule ought to apply in the case of structural or organizational changes by employers -- such as a divestiture, plant closing, or outsourcing -- that result in the termination of employees. It is normal for an employer in such situations to consider possible savings in compensation costs, of which benefit costs are a significant portion, in deciding whether or how to make such a change.

Nothing in the language of § 510 suggests that employers should be prevented from making such changes if they are based on consideration of the normal costs of maintaining employee benefit plans as contrasted to targeting

of particular employees because of their benefit rights. Nor does the legislative history of § 510 support such a construction. Congress was aware that employers are influenced by cost issues in making decisions about benefit plans and did not draft § 510 so as to prohibit general benefit cost concerns from affecting employment actions. Similarly, the weight of federal circuit court decisions supports the view that an employer does not violate § 510 by making organizational changes that result in termination of employment unless those changes are motivated by a desire to interfere with particular participants' attainment of particular rights to benefits.

ARGUMENT

Section 510 of ERISA provides, in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act.

This single sentence of the statute includes two separate prohibitions. The first, referred to as the "anti-retaliation"

provision of § 510,[2] generally prohibits retaliation in response to the exercise of an ERISA-protected right; it has been only infrequently litigated and is not directly implicated in this case. The second prohibition, referred to as the "non-interference" provision,[3] has, however, been the subject of considerable litigation and governs the question presented to the Court. The two provisions mirror each other and, taken together, prohibit certain employment-related actions that are intended either to retaliate for a participant's past exercise of benefit rights or to interfere with the participant's future attainment of rights.

By its terms, § 510's non-interference provision makes it unlawful: 1) to discharge or commit other employment-related acts against 2) a participant or beneficiary 3) for the purpose of interfering with 4) the attainment of any right to which "such participant" may become entitled 5) under the plan or under Title I of ERISA (or prior law). Although the first two of these elements are sometimes disputed in other cases, petitioners here have adequately alleged that they were discharged from employment while they were participants in ERISA-covered employee benefit plans. The question presented is whether they have stated a

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[2] *See Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1486 (4th Cir.), *cert. denied*, 117 S. Ct. 54 (1996); *McKinnon v. Blue Cross & Blue Shield of Ala.*, 935 F.2d 1187, 1189 (11th Cir. 1991).

[3] *See McClure v. Zoecon, Inc.*, 936 F.2d 777, 780 (5th Cir. 1991); *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1164 (6th Cir. 1988); *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 800 (9th Cir. 1987).

valid claim for relief for violation of § 510 by adequately pleading that their discharge was undertaken for the purpose of interfering with their attainment of rights under either a plan or ERISA.

This Court has recognized -- as the legislative history of § 510 makes clear -- that the "prototypical" claim covered under § 510 involves a termination of employment "motivated by an employer's desire to prevent a pension from vesting." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142-43 (1990), *citing* S. Rep. No. 93-127, at 35-36 (1973) and H.R. Rep. No. 93-533, at 17 (1973); *see also West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980) (characterizing § 510's legislative history as reflecting that its "prohibitions were aimed primarily at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights"). This prototypical claim fits squarely within § 510's language since there is no question that an employment termination designed to prevent a participant from vesting has been undertaken "for the purpose of interfering with the attainment of" the right of "such participant" to vest, a right that is protected by ERISA. *See* ERISA §§ 201-211, 29 U.S.C. §§ 1051-1061.

The courts that have grappled with § 510 have recognized that the statutory language should not be read so that any termination of a plan participant's employment is considered to be interference with that participant's future attainment of rights under the plan. Refusing to construe the statute as providing a guarantee of continued employment for plan participants, those courts have held that § 510 should

not be construed to prohibit a termination of employment where the loss of benefit rights is merely a result, not a motivating cause, of the termination.[4] To distinguish lawful from unlawful terminations, they have articulated the requirement that a plaintiff seeking to prove a violation of § 510 must allege and prove that the defendant had a "specific intent" to interfere with that plaintiff's attainment of benefit rights.[5]

In the context of an employment termination of an individual plaintiff, the "specific intent" standard has been relatively easy to apply. If all a plaintiff can show is that termination of employment also terminated his or her

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[4] *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988) ("ERISA does not guarantee every employee a job until he or she has fully vested into a company's benefit plan"). *See also Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987) ("Proof of incidental loss of benefits as a result of a termination will not constitute a violation of § 510.")

[5] *Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 37 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 914 (1996); *Brandis v. Kaiser Aluminum & Chem. Corp.*, 47 F.3d 947, 950 (8th Cir. 1995); *Hopkins v. Seagate*, 30 F.3d 104, 106 (10th Cir. 1994); *Unida v. Levi Strauss & Co.*, 986 F.2d 970, 980 (5th Cir. 1993); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1491 (11th Cir. 1993); *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992); *Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 127 (7th Cir. 1991); *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 238 (4th Cir. 1991); *Dytrt v. Mountain State Tel. & Tel. Co.*, 921 F.2d 889, 896 (9th Cir. 1990); *Gavalik v. Continental Can Co.*, 812 F.2d at 851.

participation in an employee benefit plan, then no "specific intent" to interfere with that plaintiff's attainment of benefit rights has been shown.[6] Courts have consistently recognized in these cases that evidence that the termination of an employee saved the employer the ordinary costs of that employee's future benefits is inadequate to establish the requisite "specific intent."[7] If, however, a plaintiff shows that the termination was motivated by some specific aspect of his or her benefit rights -- typically, that his or her attainment of a particular benefit right would significantly increase the employer's cost of providing benefits -- then "specific intent" has been demonstrated.[8]

Where a claim for violation of § 510 does not involve circumstances unique to an individual plaintiff but arises from what the court in *Andes v. Ford Motor Co.*, 70 F.3d 1332, 1337 (D.C. Cir. 1995) referred to as an "organi-

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[6] *Teumer v. General Motors Corp.*, 34 F.3d 542, 550 (7th Cir. 1994); *Unida v. Levi Strauss & Co.*, 986 F.2d at 980; *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1222 (11th Cir. 1992); *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d at 239.

[7] *See Conkwright*, 933 F.2d at 239 ("[The] suggestion that Westinghouse acted illegally because it acted to save money proves too much. Under that reasoning, any actions by an employer that result in savings would be suspect."); *see also Lehman v. Prudential Ins. Co.*, 74 F.3d 323, 330-31 (1st Cir. 1996).

[8] *See Salus v. GTE Directories Serv. Corp.*, No. 96-1744, 1997 U.S. App. LEXIS 473, *7 (7th Cir. Jan. 10, 1997); *Godfrey v. BellSouth Telecomm., Inc.*, 89 F.3d 755, 759-60 (11th Cir. 1996); *Folz v. Marriott Corp.*, 594 F. Supp. 1007, 1014-15 (W.D. Mo. 1984).

zational change" in the employer's business, the application of § 510 has proved more problematic. The fact that the employer's benefit cost savings may be greatly multiplied if many employees are terminated raises the specter of a greater motivation related to benefit costs. If, however, the employer's savings merely reflect the normal costs of these employees' future benefits, there is no greater reason to infer a specific intent to violate § 510 than there would be in the case of termination of an individual employee. Rather, because the statutory language applies equally to a termination of employment that affects only one employee and to a termination of many employees resulting from an organizational change, the application of that language should also remain the same.

Employers that want to remain competitive will continuously review whether their businesses might be structured or organized in some more efficient or productive manner. In many circumstances, companies have sold or divested business units that no longer fit within the companies' strategic plans.[9] Other companies have closed plants or facilities or laid off portions of their workforce.[10] Yet other situations, as in this case, have involved outsourcing, *i.e.*, a decision by a company that it could more efficiently purchase from an outside vendor goods or services that it

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[9] *See Andes*, 70 F.3d 1332; *Aronson v. Servus Rubber*, 730 F.2d 12 (1st Cir.), *cert. denied*, 469 U.S. 1017 (1984).

[10] *See Deeming v. American Standard, Inc.*, 905 F.2d 1124 (7th Cir. 1990); *Unida v. Levi Strauss & Co.*, 986 F.2d 970; *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987).

formerly provided for itself.[11] In all of these instances of "organizational change," employees in the affected business unit are frequently terminated from employment as a result of the change.

An employer considering such an organizational change will naturally consider its cost implications, including any cost savings. Compensation costs are an obvious area of potential savings, and the costs of providing employee benefits are a significant portion of compensation costs.[12] As stated in the *amicus* brief of the United States, employers may be largely indifferent about the components of compensation cost savings; an employer will generally not care whether the reduction comes from wages or from non-wage compensation such as benefits. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners ("U.S. Br.") at 22-23. The application of § 510 should not depend on whether an employer is astute enough to recognize, or candid enough to state, that benefit costs played a significant

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[11] *Seaman v. Arvida Realty Sales*, 985 F.2d 543 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 308 (1994).

[12] *See* U.S. Chamber of Commerce, *Employee Benefits* (1996) (average cost of employee benefits reached 42 percent of payroll in 1995); U.S. Department of Labor, *Employment Cost Index July-September 1996* (Oct. 1996); U.S. General Accounting Office, Human Resources Div., *Employer-Based Health Insurance: High Costs, Wide Variation Threaten System* (GAO/ HRD-92-125) (1992) at 4-6. *See also Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d at 239 ("It is obvious that benefit costs make up a large amount of the costs of an employee to a company, and that pension rights are a substantial component of benefit costs.").

role in a decision to make an organizational change that resulted in termination of employees. An employer might outsource a service for reasons that are unrelated to compensation costs, such as to obtain access to a technology which it can not provide for itself or which can be provided more efficiently by an outside vendor. It is also possible that an employer might outsource in order to save total compensation costs but have no idea whether the savings were in any way attributable to employee benefit costs. For example, an employer deciding whether to contract out services that it currently provides internally will care about the contractor's price compared to its own cost of providing services, not about the components of the contractor's price. In any of these situations, plan participants who lost their jobs as a result of the outsourcing would also lose the ability to claim future benefits. Yet, since the employer's intent had nothing to do with benefit costs, much less benefit rights, it would be difficult to conclude that the employer had violated § 510 by undertaking the outsourcing for the purpose of interfering with the attainment of benefit rights.

The conclusion that § 510 has not been violated in these situations should not change merely because the employer identified benefit costs in general as one of the elements, or even the principal element, of the cost savings it hoped to achieve through the outsourcing. Many employers in such situations will, of course, focus on the components of cost savings in order to understand whether there are alternatives to outsourcing, including possible modifications to wages or benefits. Focusing on benefit costs is not necessarily the same thing as focusing on ERISA-covered benefit plans; as this case shows, *see* p. 19 *infra*, benefit

costs may be attributable to non-ERISA covered benefits. Assuming, *arguendo*, that a focus on benefit costs is equated to a focus on ERISA-covered benefit plans, the question is whether an employer's decision to outsource work or otherwise undertake an organizational change that results in the termination of employees is illegal under § 510 if it is motivated by a desire to save the normal costs of maintaining employee benefit plans, as contrasted to the practice, which § 510 plainly prohibits, of targeting individual employees for termination because they are about to attain particular benefit rights.

Petitioners do not suggest that their termination interfered with their attainment of particular benefit rights but argue that it was unlawful because it was undertaken "for the purpose of lowering the amount of health and welfare and retirement benefits that they would receive." (Pet. Br. at 15.) Similarly, the brief of the United States takes the position that the specific intent necessary to establish a violation of § 510 is proved where "there is evidence that an employer has contracted out its work, and thus discharged its employees, for the specific purpose of escaping obligations to pay benefits." (U.S. Br. at 23.) To the extent that such a construction of § 510 merely encompasses the prototypical claims of individual plaintiffs, it is unexceptional. For example, if evidence showed that an employer had outsourced work because employees in the affected business unit were close to vesting in their accrued pension benefits, each of those employees could state a claim for violation of § 510. To the extent, however, that this construction would brand as illegal under § 510 an employer's decision to outsource work that was motivated by a desire to save the

normal costs of maintaining employee benefit plans, as contrasted to a desire to prevent identifiable participants from attaining specific benefit rights, it is not warranted by the statutory language, legislative history, or case law.

Nothing in the language of § 510's non-interference provision suggests that plan participants in general are conferred protection against adverse employment actions that result from employer decisions based on the costs of their employee benefit plans. Instead, the statutory language focuses on interference with the attainment of rights by a "participant" and should be read only as applying in situations -- like the prototypical claim involving a discharge to prevent pension vesting --- where a particular participant is targeted for adverse employment action because of some particular benefit right yet to be attained. Of course, more than one participant could be targeted for the same reason, and a group of such participants may assert their claims in a single action. By its terms, however, § 510 confers individual protection for a participant or beneficiary from interference with "such participant's" attainment of benefit rights.

Nor does the legislative history of ERISA suggest a congressional intent that § 510 be construed to prevent employers from taking employment-related actions based on a general desire to eliminate or reduce their overall benefit costs. To the contrary, § 510's legislative history speaks directly only to the situation in which an individual is terminated or adversely affected in employment in order to prevent future attainment of a particular benefit right, such

as pension vesting.[13] Other portions of ERISA's legislative history, moreover, evidence a congressional recognition that employers' willingness to create and maintain employee benefit plans is heavily influenced by the costs of such plans.[14] Indeed, as the Court has held, Congress left employers generally free, subject to specific provisions of the statute and governing plan documents, to modify or even terminate benefit plans for any reason including their cost. *See Lockheed Corp. v. Spink*, 116 S. Ct. 1783, 1789 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1228 (1995). While none of this legislative history directly addresses whether § 510 was intended to prohibit an employer's consideration of benefit costs in taking actions that result in terminations of employment, it does make evident that Congress was aware of employers' cost concerns regarding benefit plans. If Congress had wanted to draft § 510 as the broad proscription suggested by petitioners and the United States, it could have done so, but it did not.

Nor does the case law in the federal circuits support such a broad reading of § 510. While, to *amici*'s knowledge, only one court has expressly attempted to analyze the application of § 510 in the context of organizational change, the results in decisions from other circuits are consistent with

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[13] *See* S. Rep. No. 93-127, at 26 (1973); 119 Cong. Rec. 30,044 (1973).

[14] H.R. Rep. No. 93-533, at 1. *See also Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148 n.17 (1985) (warning against expanding liability beyond that intended by Congress "lest the cost of federal standards discourage the growth of private pension plans").

a construction of § 510 as not prohibiting employment actions that are not targeted at individual participants but are motivated by a general desire to reduce benefit costs. In *Andes v. Ford Motor Co.*, 70 F.3d 1332, the D.C. Circuit addressed a claim that an employer had violated § 510 when it sold a business unit, allegedly in order to avoid payment to employees in that unit of valuable early retirement benefits to which these employees would have become entitled in the future. The *Andes* opinion reviewed decisions from six other circuits that had considered claims of violation of § 510 in the context of employment terminations arising from an "organizational change" as distinct from terminations of "individual employees...in the absence of an organizational change." *Id.* at 1337. Noting that, as a practical matter, "it is highly unlikely that an organizational decision would not be motivated, at least in part, by benefit considerations," the court commented on the fact that five of the six circuits had "easily rejected" the § 510 claims and stated:

> This pattern suggests to us that our sister circuit courts have implicitly recognized that a corporate organizational change that results in the termination of employees is really not a prototype of the sort of action that § 510 was primarily designed to cover.

Id. Based on its examination of § 510's language and legislative history, the *Andes* court concluded that Congress intended that "an employer's decision to sell or close down an operation would not normally implicate § 510 merely because the action caused the termination of employees." *Id.*

The court went on to recognize, however, that "a company's basic organizational decision" would implicate § 510 where such a decision "merely masks a determination to interfere with the employees' attainment of benefit plan rights." *Id.* at 1338.

While the *Andes* court reached its conclusion by interpreting the word "discharge" as used in § 510 to refer only to situations involving individual terminations of employees, *amici* believe that the same conclusion follows from the principles discussed above. As *Andes* observed, the fact that a termination of employees affecting benefit rights occurs as a result of an organizational change is not by itself dispositive of the § 510 analysis. What is critical is whether the employment action at issue is targeted at identifiable participants in order to prevent their attainment of particular rights under a particular plan. Only if such a targeted action occurs should § 510 be violated.

Such a construction of § 510 is not only faithful to the language and recognized purpose of § 510 but it also would provide a remedy in the fact situations urged by the United States as warranting a broader construction. (U.S. Br. at 16-17.) Thus, the targeting for termination of employees who were about to incur huge medical expenses or to become vested in rights to particular benefits would be prohibited by § 510. What would not be prohibited is an employer's decision to divest a unit or to outsource work based, in whole or in part, on consideration of normal benefit costs.

The United States cites two circuit court decisions to support the broad proposition it advocates. (U.S. Br. at 23.)

One of those decisions, *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987), can, as noted in *Andes*, 70 F.3d at 1338-39, be read consistently with the construction of § 510 urged here by *amici*. In *Gavalik*, the court affirmed a finding of a § 510 violation on the part of a company that, among other actions, closed a production line in order to avoid paying the costs of special pensions that would be attainable by employees who worked there. Despite broad language in the Third Circuit's decision, its conclusion is entirely consistent with the view that the closing of the line violated § 510 because it was intended to interfere with the attainment of particular pension rights by particular employees.

The other decision, *Seaman v. Arvida Realty Sales*, 985 F.2d 543 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 308 (1994), can not be read consistently with the interpretation that *amici* urge. There, a company decided to terminate its salespersons and offer them contracts as independent contractors which did not provide for certain benefits that were provided to employees. *Id.* at 544. The Eleventh Circuit held that plaintiff had stated a claim for violation of § 510 by alleging that her termination occurred "because she would not give up the right to continued participation in the health plan and for the specific purpose of interfering with her rights under ERISA." *Id.* at 546. Although the court's discussion focused on the situation of the individual plaintiff who had been terminated and had refused to accept independent contractor status, the opinion makes clear that all salespersons had been asked to become independent contractors and makes no mention of any particular benefit right that the plaintiff was about to attain. *Id.* at 544.

Assuming that no such particular right existed, *Seaman* misapplies § 510 and converts a plaintiff's status as a plan participant into a guarantee of continued status as an employee. There is no reason why § 510 should prohibit an employer from deciding that in the future it would prefer to obtain from outside contractors services that it has historically provided for itself. The fact that the plaintiff was offered a contract as an independent contractor should be irrelevant to the § 510 analysis since it is only the termination decision to which the statute arguably applies, and it is unlikely in the extreme that Congress could have intended to require that an employer refuse to contract with former employees in order to avoid violation of § 510.

Petitioners here do not suggest that their termination from employment had anything to do with any particular rights that any of them were about to attain under any ERISA-covered employee benefit plan. Indeed, although petitioners now attempt to recast their allegations as involving ERISA-covered benefit plans in which they were participants as a result of their Teamsters Union membership, the specific allegations of their Complaint all refer to non-ERISA covered benefits provided under the Railroad Retirement Act. (Pet. 28a, ¶¶ 28, 31; 29a, ¶ 33.) Even if their allegations did focus on ERISA-covered benefits, however, they still have alleged nothing to suggest that the motivation for their termination was anything other than general cost savings as contrasted to the targeting of individual participants to interfere with their attainment of particular plan rights that § 510 prohibits.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to affirm the decision of the Court of Appeals.[15]

[15] Petitioners, not supported by their *amici*, also ask the Court to decide what relief is available for a violation of § 510. (Pet. Br. at 36-39.) Because this question is not within the writ of certiorari granted by the Court, *amici* do not address it. If the Court were to address the question, it should reject petitioners' argument that the scope of "appropriate equitable relief" available under § 502(a)(3)(B) for a breach of fiduciary duty that the Court addressed in *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993) differs from the scope of "appropriate equitable relief" available under § 502(a)(3)(B) for a violation of § 510.

Respectfully submitted,

ROBERT N. ECCLES
Counsel of Record
KAREN M. WAHLE
O'MELVENY & MYERS LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 383-5300

JAN S. AMUNDSON
QUENTIN RIEGEL
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 627-3000

ROBERT W. BLANCHETTE
KENNETH P. KOLSON
ASSOCIATION OF AMERICAN RAILROADS
50 F. Street, NW
Washington, DC 20001
(202) 639-2511

Counsel for Amici Curiae

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